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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 W. MARK FRAZER AND KONILYNN
8 FRAZER,

9 Appellants,

v.

10 DEUTSCHE BANK NATIONAL TRUST
11 COMPANY, AS TRUSTEE FOR MORGAN
12 STANLEY ABS CAPITAL I INC., TRUST
13 2006-NC4, ITS SUCCESSORS IN
14 INTEREST, AGENTS, ASSIGNEES,
15 AND/OR ASSIGNORS AND THROUGH ITS
16 SERVICING AGENT WELLS FARGO
17 BANK, N.A., NORTHWEST TRUSTEE
18 SERVICES, INC.,

Appellees.

No. 3:11-CV-05454-RBL

ORDER GRANTING APPELLANTS'
MOTION TO EXTEND THE DEADLINE
TIME FOR FILING AN OPENING BRIEF

[Dkt. #14]

ORDER DENYING STAY OF ORDER
PENDING APPEAL

[Dkt. #15]

18 This matter is before the Court on Frazers' Emergency Motion for Nunc Pro Tunc
19 Allowance of a Second Motion to Extend the Deadline Time for Filing an Opening Brief [Dkt.
20 #14], and on Frazers' Emergency Motion for Stay of Order Pending Appeal [Dkt. #15].

21 **I. MOTION TO EXTEND DEADLINE**

22 The Frazers request that the Court extend the deadline to file an opening brief. The
23 Frazers were to have filed an opening brief by November 8, 2011, and that deadline has well
24 passed. The Frazers, who are proceeding *pro se*, claim that extending the deadline is warranted
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1 because they are overwhelmed by the voluminous requirements of the legal system. The Court
2 will extend the deadline for the Frazers to file an opening brief to March 16, 2012.

3 **II. MOTION TO STAY PENDING APPEAL**

4 **A. Background**

5 On March 24, 2006, the Frazers purchased real property with money borrowed from
6 Home 123 Corporation. The loan was for \$484,000.00, and was secured by a Deed of Trust
7 which named the Frazers as “borrowers,” Home123 as “lender,” and Ticor Title as “trustee.”
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9 On or about April 3, 2006, Deutsche Bank National Trust Company, as Trustee, received
10 the original Note executed by the Frazers, and the Note was indorsed in blank. By the closing
11 date of the Trust, June 23, 2006, the Depositor of the Trust, Morgan Stanley ABS Capital I Inc.,
12 conveyed all right, title, and interest to the mortgage loans in the Trust, including the Frazers’
13 loan, to Deutsche Bank for the benefit of the certificate holders of the Trust.
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15 On January 26, 2010, Deutsche Bank sent the Note and related loan documents to the
16 servicer of the loan, Wells Fargo Home Mortgage, and these documents were returned on
17 February 12, 2010. On February 14, 2011, Deutsche Bank returned the loan documents to Wells
18 Fargo.

19 On February 27, 2010, Wells Fargo appointed Northwest Trustee Services, Inc. (NWTs)
20 as successor trustee by a recorded appointment of successor trustee. On March 3, 2010, NWTs
21 recorded a notice of trustee’s sale. At the time of the notice of sale, the Frazers were \$67,612.50
22 behind on their monthly payments under the Note.
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24 Two days before the trustee’s sale was scheduled to take place, on June 2, 2010, the
25 Frazers filed for bankruptcy under Chapter 13, which automatically stayed the foreclosure on the
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1 property.¹ On July 9, 2010, the Trust filed a proof of claim related to the Note evidencing a real
2 property mortgage loan for the property. The Frazers objected to the proof of claim by the Trust,
3 and the Frazers were permitted by the bankruptcy court to litigate their claim through an
4 adversary proceeding. The Trust moved for summary judgment dismissal of the adversary
5 proceeding, and the bankruptcy court granted the motion on May 27, 2011. Only NWTs
6 remained as a defendant. On September 23, 2011, NWTs moved for summary judgment
7 dismissal of the adversary proceeding, and the bankruptcy court granted NWTs's motion on
8 November 7, 2011. Meanwhile, the bankruptcy court closed the bankruptcy case without
9 discharge on November 3, 2011.

11 The Frazers appealed the dismissal of the Trust to this Court. They now ask this Court to
12 enjoin the Trust from pursuing foreclosure on their property pending appeal. Appellants' Mot. to
13 Stay at 2. The Frazers' Motion and supporting affidavits claim a stay is warranted for the
14 following reasons:

- 16 • Protect their right to appeal
- 17 • Allow additional time to finalize their settlement agreement with the New
18 Century Liquidating Trustee
- 19 • The Note and Deed of Trust is not valid
- 20 • The Note and Deed of Trust was never conveyed, transferred, or assigned to
21 Deutsche Bank in compliance with the Pooling and Service Agreement ("PSA")
- 22 • The Note and Deed of Trust is under the jurisdiction of the Delaware District
23 Bankruptcy Court
- 24 • The PSA is governed under New York State law, not Washington State law.

25 *See Id.*; Decl. of W. Mark Frazer and Konilynn Frazer [Dkt. #15].

26 ¹ The bankruptcy court converted the bankruptcy proceeding from a Chapter 13 to a Chapter 7 bankruptcy on February 11, 2011.

1 In response, Deutsche Bank argues that the Frazers have failed to meet their burden to
2 justify a stay and thus, Deutsche Bank should be allowed to proceed with the foreclosure of the
3 property. *See* Appellees’ Opp’n to Motion at 2 [Dkt. #17].

4 **B. Discussion**

5 The purpose of a temporary restraining order is “preserving the status quo and preventing
6 irreparable harm just so long as is necessary to hold a hearing [on the preliminary injunction
7 application], and no longer.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto*
8 *Truck Drivers*, 415 U.S. 423 (1974); *see also Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126,
9 1130-31 (9th Cir. 2006). To obtain a TRO or a preliminary injunction, the moving party must
10 show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the
11 moving party in the absence of preliminary relief; (3) that a balance of equities tips in the favor
12 of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res.*
13 *Def. Council, Inc.*, 555 U.S. 7, 22–23(2008).

14 Traditionally, injunctive relief was also appropriate under an alternative “sliding scale”
15 test. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). However, the Ninth
16 Circuit overruled this standard in keeping with the Supreme Court’s decision in *Winter*.
17 *American Trucking Ass’ns Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
18 (holding that “[t]o the extent that our cases have suggested a lesser standard, they are no longer
19 controlling, or even viable”).

20 Even if the Court assumes, without deciding, that the Frazers can establish that the
21 elements of irreparable harm and public interest weigh in their favor, the Court finds that the
22 Frazers have not established that they are likely to succeed on the merits and that the balance of
23 equities tips in their favor.
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1 The Frazers have made no showing whatsoever that they are likely to succeed on the
2 merits of any of their claims. Indeed, it is unclear from the motions exactly what claims they are
3 trying to assert. The bulk of the Frazers' arguments appear to rest on the assertion that Deutsche
4 Bank did not follow the terms of the PSA and New York State law in properly transferring their
5 Loan into the Trust and thus, Deutsche Bank has no authority over the Frazers' mortgage. *See*
6 Appellants Mot. for Stay at 6-9.

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8 Because the Frazers are proceeding *pro se*, the court extends some latitude to their
9 pleadings. Nevertheless, the Court finds that the Frazers have no standing to challenge whether
10 the Trust followed the terms of the PSA. Whether the Trust followed the terms of the PSA in
11 transferring the loan into the Trust is an issue that has neither no bearing in this matter nor does it
12 involve the Frazers. In addition, Washington State law—not New York State law—governs this
13 matter: the promissory Note was executed in Washington; the property is located in Washington;
14 and the foreclosure is to occur in Washington.

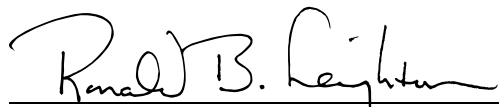
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16 Finally, the Frazers assert a cause of action for an “incorrect note.” They claim that five
17 unique indorsements were required to effectuate the transfer, and in this case, only one
18 indorsement was made. However, Washington State law clearly provides that the person entitled
19 to enforce a promissory note is the holder of the instrument, and that the holder of an instrument
20 in blank—whereby the note is payable to the bearer—is the person in possession and may
21 enforce it. RCW 62A.3-301; RCW 62A.3-205(b). Deutsche Bank was in possession of the Note
22 executed in blank and is entitled as the bearer to foreclose on the Deed secured by the Note. The
23 indorsements in blank did not discharge the Note nor cause the Deed to cease securing the Note.
24 In short, the Frazers have failed to provide any argument or evidence to establish that they are
25 likely to prevail on any issue.
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1 At the time NWTS executed a notice of trustee's sale, the Frazers were \$67,612.50
2 behind on their monthly payments under the Note, and they have not made any payments on the
3 Note since January 2009. Appellees' Opp'n to Mot. at 4, 8. The Frazers seek to raise a variety
4 of defenses to the machinations of the mortgage industry; the tax consequences to Deutsche
5 Bank in foreclosing on the property; and the legality and timing of the various transfers of the
6 lender's security interest in the property. *See generally* Appellants' Mot. The Frazers do not
7 even attempt to address whether they did or did not borrow money to purchase their home, or
8 whether they paid their obligations under the terms of the Note they now dispute. Instead, the
9 Frazers dispute that Deutsche Bank did not follow the terms of the PSA and New York State law
10 in properly transferring the loan. *Id.* at 9. The hardship the Frazer family will undoubtedly
11 endure is a factor in favor of an injunction. But neither it nor the suggested technical
12 imperfections in the foreclosure process count as equities on the Frazers' side of the ledger. The
13 balance of equities weighs in favor of Deutsche Bank.
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16 III. CONCLUSION

17 The Frazers' Motion to Extend the Deadline Time for Filing an Opening Brief [Dkt. #14]
18 is GRANTED. The Frazers have not met their burden to obtain a stay or preliminary injunction.
19 Their Motion [Dkt. #15] for such relief is therefore DENIED.
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21 DATED this 5th day of March, 2012.
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25 RONALD B. LEIGHTON
26 UNITED STATES DISTRICT JUDGE